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Attorneys for Defendant

SUPERIOR COURT
ARIZONA
2009 DEC 21 PM 3:46
CLERK
BY: S Smisko

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300CR20081339

Division 6

**DEFENDANT'S MOTION IN
LIMINE RE: DNA-RELATED
TESTIMONY**

(Oral Argument Requested)

Defendant Steven C. DeMocker moves in limine for the exclusion of testimony with respect to blood and other biological evidence that could mischaracterize the evidence and misinform the jury at the time of trial. This motion is based upon the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

We file this motion today in anticipation of oral arguments on motions in limine scheduled for January 12-15, 2010. This motion relates to testimony that the State may wish to offer at trial with respect to the inferences and conclusions to be drawn from

1 blood and other biological evidence. This motion, while necessary in light of the
2 scheduled hearings on motions in limine, and in light of the approaching trial date, is in
3 some respects premature. As this Court knows, the State has recently advised that it
4 intends to examine at least 14 items of physical evidence for the presence of testable
5 DNA. Although the Court has now ordered on several occasions that information with
6 respect to these examinations be provided forthwith, as of this date we have only partial
7 information. The information provided to the defense in the last few weeks suggests
8 that additional testing may be underway with respect to garments worn by the victim,
9 and numerous other objects found in and around the crime scene. The Court has
10 ordered that the County Attorney inform the defense in advance of any additional
11 proposed testing, but the prosecution has yet to provide additional information beyond
12 its statements in open court that 14 items are being set aside to be tested. As to one item
13 (the tank top that has been discussed in court on several occasions), the State has
14 advised that its present intention is to send that item to the laboratory used in this case
15 by the defense (Chromosomal Laboratories) and to have a representative from one of
16 the State's labs in attendance at the examination of that item.

17 At the conference with Court and counsel on Thursday, December 17, 2009, the
18 State again advised that would be providing either that day or on Friday, December 18,
19 2009, a list of the now "14 or 15" items the State still wishes to submit for further
20 examination. As of December 20, we have not received that list. In addition, as the
21 Court will recall, Mr. DeMocker's attorneys filed a motion for appropriate sanctions
22 with respect to numerous materials relevant to the State's examinations for biological
23 evidence. See Motion to Compel filed on October 7, 2009, and argued on November
24 17, 2009. That argument resulted in an order dated November 17, 2009. While some of
25 the ordered production has occurred now, much of what the defense requested and the
26 Court ordered has not. In correspondence, we have provided to the State a list of the
27 materials we have yet to receive from the two laboratories utilized by the State—
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1 Sorenson and DPS. A copy of our most recent correspondence on this point is attached
2 as Exhibit 1.

3 It should be obvious, for these reasons, that the defense has yet to be able to
4 conduct Rule 15 interviews of the State's proposed DNA-related witnesses. In the most
5 recent list of proposed witnesses, we believe there may be at least five crime lab
6 witnesses—none of whom have yet been interviewed. Therefore, the central issues
7 underlying this motion in limine arise because of testimony given by the Sheriff
8 Office's grand jury witness, former Detective Doug Brown. While he has been
9 examined now on some of the DNA issues, there remains much that could not be
10 explored and his Rule 15 interview has yet to be scheduled. For all of these reasons, our
11 motion here is premature. We have concluded, however, that it would be helpful to the
12 process of considering future motions for us to set forth our areas of primary concern.
13 They are these.

14
15 (1) Presentation of False or Misleading Evidence.

16 This Court has seen the manner in which evidence with respect to DNA
17 found (or not found) has been presented in the grand jury proceedings in this case.
18 Indeed, one of the central reasons for this Court's Order remanding this case for a new
19 finding of probable cause under Rule 12.9 was the misleading manner in which
20 testimony regarding DNA had been presented to the grand jury. Order dated January
21 22, 2009, at 2-3. The incomplete laboratory reports to date fail to provide Defendant
22 with a basis for confidence that the State's witnesses will not continue to testify in a
23 misleading manner at the time of trial. Several specific examples support our concerns:

24 --The male DNA under the victim's fingernail. The State has yet to concede or
25 confirm in its witness statements or otherwise that it may not endeavor again to
26 call witnesses to testify in a manner that might be designed to suggest that the
27 presence of biological evidence under the victim's fingernail should be
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1 discounted or ignored by the jury. One possibility evident from the prior
2 testimony in this case is that the State will seek to minimize this evidence by
3 suggesting that the male DNA might have resulted from the use of unsterilized
4 nail clippers used during the autopsy. We also do not yet know whether the
5 State's witnesses will concede that the DNA profile (Evidence Item 603) is not a
6 partial profile but is, instead, a complete male profile with above-threshold male
7 alleles at every loci. We do not know whether the State may attempt to argue
8 that the mixture, which includes the victim's blood, somehow might lead an
9 analyzing criminalist to regard the exclusion of Steve DeMocker as
10 "inconclusive."

11 --Other partial male DNA profiles found on light bulbs, the cordless phone, and
12 the door handle. The State has yet to confirm that Steve DeMocker is excluded
13 from each of these DNA extractions. Witnesses for the State have yet to file
14 reports or provide testimony clearly confirming that these male samples are not
15 Steve DeMocker's and that, as to this question, they are not "inconclusive." It
16 would be prejudicially misleading for any laboratory or law enforcement witness
17 to suggest to the jury that the partial DNA profiles might be "consistent with"
18 Steve DeMocker's DNA. The State has a complete DNA profile taken for STR
19 comparison purposes. The State knows—or should know—that the male DNA
20 found on each of these items (light bulbs, phone and door handle) excludes Steve
21 DeMocker.

22 In the first Rule 12.9 remand proceeding, this Court concluded that the State has
23 an important duty to avoid presenting misleading evidence to a grand jury. Order of
24 January 22, 2009, at 2. There can be no doubt that similar prosecutorial duties attend
25 the presentation of evidence at trial. Some might argue, we suppose, that strict
26 enforcement of rules against the presentation of false or misleading testimony are less
27 necessary at trial than before a grand jury. The presence of defense counsel and
28

1 effective cross-examination along with the defendant's ability to call witnesses in his
2 own behalf, it might be argued, will assure that no prejudice arises from potentially
3 misleading testimony. Those experienced in the fields of forensic science know this to
4 a false assumption.

5 Juries tend to have difficulty comprehending the details of the STR method of
6 DNA analysis. Instead, juries tend to want to be able to rely on strong scientific
7 evidence to support their impressions and conclusions about the guilt of the accused.
8 This tendency has become known as the "CSI effect." In this case the jury should be
9 told one and only one thing about the biological evidence: to whatever extent biological
10 evidence has been found, that evidence excludes Steve DeMocker.

11 (2) Testimony Deviating from the Experts' Reports.

12 Experience causes Mr. DeMocker's attorneys to anticipate a second, related
13 potential problem. Some criminologists and laboratory witnesses have been heard to
14 express the belief that they may deviate from their report findings when called to testify.
15 This phenomenon arises most commonly in cases in which the volume of DNA at
16 particular loci is below the thresholds established by the laboratory for drawing
17 inferences from it. Since we have yet to interview the laboratory personnel we cannot
18 be sure that this will become an issue, but we are aware of other Arizona cases in which
19 DPS personnel have expressed the opinion that they may offer their "personal"
20 professional views of the existence of relevant DNA even if the formal report seems to
21 exclude consideration. If we see examples of this potential area of concern arising, we
22 will move promptly to supplement this motion in limine.
23

24 (3) General Reporting and Descriptive Problems.

25 The "below threshold" issue is related to the larger problem of inaccurate and
26 misleading descriptions of findings involving biological evidence. This is one of the
27 central areas of concern expressed by the National Academies in their report entitled
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1 *Strengthening Forensic Science in the United States: A Path Forward*, issued in
2 February of this year. The lack of consistent policies for the reporting of DNA evidence
3 findings may well prove to be an issue in this case. The inconsistent use of phrases such
4 as “inconclusive,” “could not eliminate,” or “could not exclude,” are all fraught with
5 potential to mislead and misinform a jury. As soon as we have been given enough
6 evidence from the reports and interviews to determine whether the DPS and Sorenson
7 witnesses might stray into these errors, we will advise the Court and, if necessary,
8 supplement our motion.

9
10 CONCLUSION

11 Each of the areas we have preliminarily identified in this Motion is sufficiently
12 problematic to address at this in limine stage. The testimony elicited at the grand jury
13 convinces us that witnesses may tend to misinterpret or mis-describe the biological
14 evidence and the lack of it. Where these deviations from proper practice occur, they
15 violate Rule 403 and 404 and often also violate the principles underlying Rule 702.
16 Unless prevented, misleading DNA-related testimony can deprive Mr. DeMocker of a
17 fair trial otherwise secured to him by the fifth, Sixth, Eighth and Fourteenth
18 Amendments of the United States Constitution and the corollary provisions of Arizona’s
19 Constitution.

20 Because of the importance of these issues, we have added them now to the
21 motions we expect to hear during the week of January 12-15, 2010.

22 Respectfully submitted this 21st day of December, 2009.

23
24
25 By: 

26 John M. Sears
27 P. O. Box 4080
28 Prescott, Arizona 86302

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Attorneys for Defendant

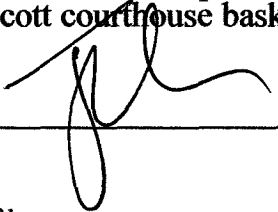
ORIGINAL of the foregoing filed
this 21st day of December, 2009, with:

Jeanne Hicks,
Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

COPIES of the foregoing hand delivered
this 21st day of December, 2009 to:

The Hon. Thomas B. Lindberg
Judge of the Superior Court
Division Six
120 S. Cortez
Prescott, AZ 86303

Joseph Butner, Esq.
Office of the Yavapai County Attorney
Prescott courthouse basket



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December 17, 2009

Carol Raleigh
Forensic Account Manager
Sorenson Forensics
2495 South West Temple
Salt Lake City, Utah 84115

Re: *State of Arizona v. DeMocker*, Case No. CR2008-1339

Dear Ms. Raleigh:

Please consider this to be a formal request for copies of the below-described documents:

(1) Laboratory Protocols

Please provide a copy of all Standard Operating Protocols (SOPs) used in connection with the testing at Sorenson Forensics. To minimize any burden of duplicating these items, we would be pleased to accept them in electronic form. Please include all SOPs for evidence collection, transport and storage as well as for chain of custody.

(2) Data Files

Please provide copies of all data files created and used in the course of performing the testing and analyzing the data in this case. These files should include all data necessary (1) to independently reanalyze the raw data, and (2) to reconstruct the analysis performed in this case. **We have not received the electronic files for PCR plate 081023-TMR for Sorenson Item # 1416 and 1417.**

(3) Laboratory Personnel

Please provide background information about each person involved in conducting or reviewing the DNA testing performed in this case, including (1) the current resume of each individual, (2) the job description of each individual and (3) a summary of each individual's proficiency test results. Please provide a copy of all records of the evidence collection training received by the criminalists involved.

Please also provide a list of each person who has access to the evidence.

(4) Software

Please provide a **complete** list of all commercial software programs used in the DNA testing in this case, including the name of the software program, the manufacturer and the versions used in this case by both labs. We received a letter from Dan Hellwig to Deb Cowell that identifies only GeneMapper software. This is not a complete list.

Thank you for your anticipated cooperation in this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,


Anne M. Chapman

cc Deb Cowell
 Joe Butner
 John Sears
 Larry Hammond
 Tricia Sherrill

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December 17, 2009

VIA E-MAIL TRANSMISSION
and U.S. MAIL

Joseph C. Butner III
Yavapai County Attorney's Office
3505 W. Highway 260
Camp Verde, AZ 86322

Re: *State v. Steven DeMocker*

Dear Joe:

We have not received the following disclosure from DPS. Please provide it to us immediately.

1. DPS lab protocols for DNA testing and analysis;
2. DPS lab protocol for sample collection and crime scene response;
3. Chain of custody documents for the following DPS reports dated 7/15/08, 2/24/09, 6/1/09 and 10/28/09;
4. Screening notes and photographs for the following DPS reports dated 7/25/08;
5. Photographs for the following DPS reports dated 7/31/08, 8/5/08, 9/2/08, 9/3/08, 1/30/09, 2/4/09, 2/19/09, 3/23/09, 5/26/09, 6/3/09, and 6/17/09;
6. DPS Data files for the following DPS reports dated 9/11/08, 2/24/09 and 6/1/09;
7. STR Frequency Tables for the following DPS reports dated 6/1/09 and 6/11/09;
8. The latest DPS external audit;
9. DPS Corrective Action log; and
10. A DPS approved abbreviation list.

Also, due to the file names and lack of electropherograms we are unable to identify which reports the following files from CD 3130 relate to: file 3100m - subfiles 22309, 060109 and 061109. Please provide the identifying information for these files immediately.

Thank you very much for your assistance in this matter. Please don't hesitate to contact me at 602.640.9389 or achapman@omlaw.com.

Joseph C. Butner III
December 17, 2009
Page 2

Sincerely yours,

A handwritten signature in black ink, appearing to read "Anne Chapman", with a long horizontal flourish extending to the right.

Anne M. Chapman

cc: Deb Cowell
John Sears
Larry Hammond
Rich Robertson
Tricia Sherrill